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In the Supreme Court of the United States

OCTOBER TERM, 1985

LOCALS 666 AND 780 OF THE INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES AND MOVING PICTURE MACHINE OPERATORS OF THE UNITED STATES AND CANADA, AFL-CIO, PETITIONERS

v.

UNITED STATES DEPARTMENT OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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Petitioners contend that the court of appeals erred in holding that they lack standing to challenge the Secretary of Labor's failure to make a wage determination allegedly required under the Service Contract Act of 1965 (SCA), 41 U.S.C. 351 *et seq.*

1. The SCA establishes minimum standards for the compensation of employees working under certain service contracts with the government (see generally 29 C.F.R. 4.103-4.105). Service contracts subject to the Act must provide that the contractor will not pay its employees less than the amount established in a wage determination issued by the Secretary of Labor (41 U.S.C. 351). The Secretary's determination is based upon the wages prevailing in the

locality or, in some circumstances, the wages set in collective bargaining agreements (41 U.S.C. 351, 353(c), 358).

In this case, petitioners' members performed still photography and film processing functions for Technicolor Government Services, Inc. pursuant to a contract with the National Aeronautics and Space Administration (NASA). The contract related to the development stages of the Space Shuttle Program and, when the shuttle became operational, NASA sought to conform its service contracts to the changed status of the program. Accordingly, the agency consolidated functions that previously had been performed under several contracts (including the Technicolor contract) into a single (Space) Shuttle Processing Contract (SPC). The SPC, which was awarded to Lockheed Space Operations Company, eliminated all still photography positions and numerous film processor positions. Any future still photography and film processing work would be done by engineers, technicians, and inspectors as an incidental part of their regular duties under the SPC (Pet. App. 2, 6).[1]

Petitioners brought this action against NASA and the Department of Labor (DOL) in the United States District Court for the Northern District of Illinois, contending that

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[1]The SCA, which covers the SPC (29 C.F.R. 4.4(c)), requires the submission of a Form 98 when a successor contractor provides services "substantially the same as services being furnished in the same locality by an incumbent contractor" and when the incumbent service employees are covered by a collective bargaining agreement. Submission of a Form 98 triggers the Department of Labor's duty to make a determination of minimum wages and fringe benefits "for the classes of service employees who will perform on the contract * * *." 29 C.F.R. 4.164(b)(2) (1983).

In this case, NASA submitted a Form 98 for the SPC but did not include still photographer and film processor positions because the SPC did not require them. The Department of Labor did not issue a wage determination for those positions.

NASA violated the SCA by allowing still photography and film processing to be included in the SPC without submitting the positions of still photographer and film processor to the Secretary of Labor for a wage determination. The complaint sought permanently to enjoin NASA from awarding the Shuttle Processing Contract until a wage determination was made as to the excluded positions.[2] The district court held that petitioners lacked standing because the complaint did not allege an injury within the zone of interests protected by the SCA (Pet. App. 7-10).

The court of appeals affirmed, stating (Pet. App. 4) that the unions failed to satisfy the constitutional and prudential requisites for standing. First, the court ruled (*id.* at 5) that loss of work is not an injury cognizable under the SCA; rather, the statute recognizes an "injury" only to successor employees who are paid less than their predecessors for performing the same services. Since petitioners' members were predecessor, not successor, employees, the statute is not applicable to them. Second, the court rejected (*id.* at 6) petitioners' contentions that their members were exploited by DOL's failure to make a wage determination because (i) the same work was not being performed by others at lower wage rates and (ii) only successor employees and unions representing successor employees may bring an action under the SCA challenging the practices of the successor employer.

2. The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review by this Court therefore is not warranted.

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[2]Petitioners also sought an injunction requiring the DOL to return the Form 98 to NASA for correction pursuant to 29 C.F.R. 4.4(e).

To satisfy Article III of the Constitution, petitioners must show, at a minimum, that they have suffered (or are threatened with) an actual injury fairly traceable to the challenged conduct of the defendant and that the requested relief is likely to redress the claimed injury. *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982); *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 72-74, 81 (1978); *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 38, 41 (1976); *Warth* v. *Seldin*, 422 U.S. 490, 498-499 (1975). Moreover, as a prudential matter, petitioners must show that they fall within " 'the zone of interests to be protected or regulated by the statute,' " *Valley Forge*, 454 U.S. at 475, quoting *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150, 153 (1970).

As both courts below ruled, Section 4 of the SCA, 41 U.S.C. 353, makes clear that the Act is remedial for *successor* employees and the unions that represent them. Accordingly, both courts correctly held that only successor employees and unions have standing to challenge statutory violations. Petitioner unions and the employees, they represent, however, are "predecessors"; their claim of injury is that certain jobs were eliminated in the successor contracts. But that is not an injury within the ambit of the statute and thus there is no "actual or threatened" injury that " 'is likely to be redressed if the requested relief is granted.' " *Valley Forge*, 454 U.S. at 475 (citation omitted).

Moreover, even if petitioners were arguably within the " 'zone of interests' " protected by the Act (*Valley Forge*, 454 U.S. at 474-475), they would still lack standing because the relief they seek could not redress their alleged injury. As the district court correctly stated (Pet. App. 10):

> [Petitioners] ask the Court to order NASA to submit to the Secretary a Form 98 including positions for still cameramen and film processors. As NASA points out,

this relief, if granted, would not result in the hiring of a single additional cameramen or film processor. Nor would it affect the wage rates paid to anyone employed by Lockheed in performance of the SPC.

In these circumstances, it is clear that petitioners lack standing and their complaint was properly dismissed.[3]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Acting Solicitor General

SEPTEMBER 1985

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[3]There is no merit to petitioners' contention (Pet. 12-15) that the decision below conflicts with *Scanwell Laboratories, Inc.* v. *Shaffer*, 424 F.2d 859, 872 (D.C. Cir. 1970), and *Local 419* v. *Brown*, 656 F.2d 564, 568 (10th Cir. 1981). *Scanwell* did not arise under the SCA. Although *Local 419* involved the SCA as well as the Davis-Bacon Act, the Tenth Circuit did not address the standing issue under either statute. Instead, the sole question decided on appeal was whether federal jurisdiction existed under 28 U.S.C. 1361 (mandamus) or 1331 (federal question).

On the other hand, the instant decision is fully consistent with the decisions of other courts of appeals that have considered the issue of standing under the SCA. See *American Federation of Government Employees, AFL-CIO* v. *Stetson*, 640 F.2d 642, 646 (5th Cir. 1981), and *American Federation of Government Employees, Local 1668* v. *Dunn*, 561 F.2d 1310 (9th Cir. 1977). In both cases, as in the instant case, the courts ruled that predecessor employees lacked standing to challenge wage-rate determinations required by the Act.